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IN THE

SUPREME COURT OF THE UNITED STATES

October term, 1973

No. 73-405

PAUL E. McARTHUR,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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BRIEF OF RESPONDENT
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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment of the Appellate Department of the Superior Court of the State of California, County of Los

Angeles, entered against petitioner in the above-entitled case on June 6, 1973, not issue.

OPINIONS BELOW

No oral or written opinions were issued by the reviewing court.

JURISDICTION

This Honorable Court has clearly established that it should not take jurisdiction to review a judgment where no opinion was delivered by the highest court of a state.

The Appellate Department of the Superior Court of Los Angeles County delivered no opinion in this case. Said appellate court, therefore, did not directly pass upon any federal questions.

As held by Stembridge v. Georgia, 343 U.S. 541, 547, 96 L.Ed. 1130, 72 S.Ct. 834 (1951):

> "Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal

ground, this court will not take jurisdiction to review the judgment. [Citations]."

Respondent would note that Part III of Appellant's Opening Brief dealt solely with a state ground. Petitioner had charged that the element of felonious intent in the charge against him had been neither alleged nor proved. It could well be that the reviewing Appellate Department of the Superior Court of Los Angeles County found that felonious intent had been alleged and proved, and that its judgment might have been based upon that finding.

QUESTIONS PRESENTED

1. Where in a non-jury criminal trial the trial judge assumes an active role in the determination of the order of testimony and the questioning of witnesses; and where the trial judge announces his decision without inquiring of petitioner whether or not he had rested his case or if he wished to present oral argument, were the rights of petitioner to a fair trial and to due

process of law, as guaranteed by the Constitutions of the United States and of the State of California, so violated by such conduct as to call for review by this Court?

2. Where in a non-jury criminal trial the prosecutor specifically inquires about petitioner's waiver of his right to counsel and the trial judge, who had also presided over petitioner's arraignment and preliminary hearing, states from personal knowledge that petitioner had waived counsel at both prior hearings, and petitioner does not contest said statement; and where petitioner is specifically asked by the trial judge whether or not he understands his right to be tried by jury, and petitioner answers affirmatively and knowingly waives that right, were the rights of petitioner to due process of law, as guaranteed by the Constitutions of the United States and the State of California, so violated as to warrant review by this Court?

STATEMENT OF THE CASE

Petitioner, Paul E. McArthur, was charged with having violated Section 484

of the California Penal Code on April 8, 1972. This section provides, in relevant part:

> "(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, . . . is guilty of theft."

Petitioner was arraigned on this charge before Judge Philip M. Newman of the Los Angeles Municipal Court on April 10, 1972. Petitioner entered a plea of not guilty and waived his right to counsel.

On April 28, 1972, a preliminary hearing on the charge against petitioner was held before Judge Newman. Petitioner again waived his right to counsel.

On June 8, 1972, petitioner's trial took place. Since petitioner expressly waived jury trial, a court trial proceeded before Judge Newman. After a presentation of evidence by both sides, Judge Newman found petitioner guilty of the offense charged.

The presentation of petitioner's direct testimony, it should be noted, consumed

much of the trial. This testimony, given in an unfettered, narrative manner, set forth in detail petitioner's story, from the time he had first ostensibly purchased trousers from the Broadway Department Store to his subsequent attempt to exchange the pants and, finally, to his arrest and questioning by store security officers.

Prior to the commencement of petitioner's direct testimony, Judge Newman informed him:

> "Mr. McArthur, you may testify on your own behalf, if you desire to do so. You do not have to testify, if you don't want to. <u>You may call any witnesses that you may have on your own behalf</u>." (Emphasis added.) (R.T. 21:4-7)

Subsequent to petitioner's direct testimony, the trial judge allowed cross-examination by the Deputy City Attorney and then proceeded to briefly cross examine the witness himself.

After completing his questioning, Judge Newman directed that the People's witness

be recalled for examination by the court. After the witness, Dorenne McDonald, a Broadway Department Store security detective, had been questioned by the court, she was cross-examined by petitioner.

After his questioning of the witness, petitioner, having already extensively covered the relevant circumstances of the case in his direct testimony, made no attempt to present further testimony. The Record on Appeal does not reveal the presence of any character witnesses that petitioner might have presented. No attempt to call such witnesses was made by petitioner.

Upon excusing Miss McDonald from the stand, Judge Neman, having no apparent reason to believe that further evidence would be presented by petitioner, either by his own testimony or the testimony of other witnesses, announced his decision and conveyed to petitioner the court's reasoning. Petitioner was found guilty of the charge and sentenced to pay a fine of $100.

REASONS FOR DENYING THE WRIT

I

THE CONDUCT OF THE TRIAL JUDGE IN PRESIDING OVER PETITIONER'S TRIAL DOES NOT CONSTITUTE ERROR

A. INTRODUCTION

The judge in a criminal, non-jury trial has a particularly demanding role to play in the American judicial system. The scope of his already considerable responsibility is further broadened when the defendant in such a trial chooses to represent himself. It is apparent that in fulfilling this role and meeting this responsibility the trial judge must be an active, guiding participant in the proceedings.

In exercising his discretion in the present case, Judge Philip M. Newman actively involved himself in the trial of petitioner. By no means, however, did Judge Newman's involvement serve to deny petitioner a fair trial. It is readily discernible from the Reporter's Transcript that the trial judge's conduct was calculated to enhance the element of fairness, not to diminish it.

Respondent would also note that the authority of a trial judge in determining the course of a non-jury trial is extremely broad. The power of the court both to limit testimony and decline to hear argument was defined by the United States Court of Appeals, Fifth Circuit, in Peckham v. Family Loan Company, 262 F.2d 422, 425 (C.A. 5, 1959). In that trial, a non-jury case, the court had refused to permit the continued questioning of certain witnesses. The Court of Appeals, finding this not to be error, noted: "It is the judge who presides at trial. He is not only empowered to keep a case moving within the bounds of reason but it is his duty to do so." (Peckham v. Family Loan Company, supra, at 425.)

The Court of Appeals further found that it was not error for the trial court to decline to hear oral argument of counsel, holding: "If argument is granted in a non-jury case it is as a privilege and not as of right." (Peckham v. Family Loan Company, supra, at 425. See also Yap v. Immigration and Naturalization Service, 318 F.2d 839, 841 [C.A. 7, 1963].)

B. ALLOWING ARGUMENT IN A NON-JURY TRIAL IS WITHIN THE SOUND DISCRETION OF THE COURT

California case law is in complete accord with these rulings of the Court of Appeals. Cases supporting the proposition that the matter of permitting argument is within the sound discretion of the court include: Kenny v. Trust Oil Co., 215 Cal. App.2d 305, 307; 29 Cal.Rptr. 909 (1963); Gillette v. Gillette, 180 Cal.App.2d 777, 781; 4 Cal.Rptr. 700 (1960); Oil Workers Int'l Union v. Superior Court, 103 Cal.App. 2d 512, 581; 230 P.2d 71 (1951); Gunn v. Superior Court, 76 Cal.App.2d 203, 205; 173 P.2d 328 (1949); Larson v. Blue & White Cab Co., 24 Cal.App.2d 576, 578; 75 P.2d 612 (1938).

Respondent would add, however, that Judge Newman did not refuse to allow petitioner to argue. Neither petitioner nor the Deputy City Attorney attempted to present argument to the court.

C. A TRIAL JUDGE IN A NON-JURY CASE IS NOT MERELY AN UMPIRE; HE CAN AND SHOULD ACTIVELY PARTICIPATE IN THE TRIAL

It is apparent from a reading of the Reporter's Transcript that the trial court in the present case did not attempt to "take over" the trial as petitioner would have this Honorable Court believe. The primary purpose of the trial judge's action, respondent would submit, was to elucidate certain points in the testimony of petitioner and the People's witness that had not been covered to his satisfaction by either petitioner or the prosecutor. Such questioning, to clarify points that might otherwise have remained obscure in the testimony of the witnesses, is supported by a number of cases: Gantner v. Gantner, 39 Cal.2d 272, 278; 246 P.2d 923 (1952); McClure v. Donovan, 33 Cal.2d 717, 736; 205 P.2d 17 (1949); Engineering Etc. Corp. v. Longridge Inv. Co., 153 Cal.App.2d 404, 417; 314 P.2d 563 (1957); Martin v. Martin, 79 Cal.App.2d 409, 410-411; 179 P.2d 655 (1947).

Especially in criminal cases, the trial judge must be more than an umpire or

spectator. As noted in People v. Bowman, 240 Cal.App.2d 358, 382; 49 Cal.Rptr. 772 (1966), the court is not compelled to sit quietly by in a trial when a few questions asked from the bench might elicit the truth. The cases reiterating this principle are legion: People v. Bonville, 268 Cal.App.2d 107, 116; 73 Cal.Rptr. 741 (1968); People v. Ward, 266 Cal.App.2d 241, 259; 72 Cal.Rptr. 46 (1968); People v. DeArkland, 262 Cal.App.2d 802, 817; 69 Cal. Rptr. 144 (1968).

Other authority in California establishes that a judge, as a trier of fact, can properly examine witnesses for the purpose of eliciting information which he believes is necessary for a determination of the case. (Brown v. Continental Grain Co., 190 Cal.App.2d 804, 807; 12 Cal.Rptr. 505 [1961]; People v. Hambrick, 162 Cal. App.2d 239, 243; 327 P.2d 570 [1958].)

It is also apparent that the trial court has the right and duty to expedite the trial, and if it is necessary for fairness and efficiency, the court should actively participate in the trial. (People v. Jones, 268 Cal.App.2d 161, 168; 73 Cal. Rptr. 803 [1968].)

California and federal case law have also held consistently that the trial court, especially in a trial without jury, has broad discretion in controlling the method of interrogation of witnesses. (People v. Romero, 156 Cal.App.2d 48, 51-52; 318 P.2d 835 [1958].) In the present case the trial judge, although displaying abundant patience and restraint in affording petitioner great latitude in the presentation of his direct testimony, did occasionally require petitioner to comport with the standards of presenting evidence normally applied to any witness or counsel. Without question, such action by a trial judge is within his discretion.

Respondent would note, furthermore, that the order of proof in a criminal case lies within the sound discretion of the trial judge, and the court's exercise of its discretion should not be disturbed on appeal in the absence of palpable abuse. (People v. Henley, 269 Cal.App.2d 263, 268; 74 Cal.Rptr. 611 [1969].)

Also, a trial judge cannot be expected to be clairvoyant. When a defendant desires to present further evidence he

must make that wish known to the court. In the present case, petitioner has made his wishes known only on appeal. Nowhere in the Reporter's Transcript is there evidence that petitioner expressed the desire to present further direct testimony or the testimony of character witnesses. There is no showing in the record that such witnesses were in court or were ever subpoenaed. There is evidence, however, that the trial judge fully informed petitioner of his right to call any witnesses on his behalf. Judge Newman's willingness to allow such testimony is apparent.

D. POSSIBLE ERRORS OF THE COURT MAY BE WAIVED OR CURED BY A COMPLAINANT'S FAILURE TO OBJECT

It is also well settled that objection to the comments of a trial judge alleged to constitute misconduct must be made at the time the conduct occurs. (People v. Hill, 116 Cal.App.2d 212, 218; 255 P.2d 54 [1953]; People v. Temple, 102 Cal.App.2d 270, 282; 227 P.2d 500 [1951].) Respondent would submit that, by analogy, ostensibly improper actions of the trial court must also be

objected to by the appealing party. No such objections were entered by petitioner at the time the alleged misconduct occurred.

The Reporter's Transcript reveals, as noted above, that after petitioner's direct testimony had apparently ended (R.T. 31: 28), the court allowed cross-examination by the Deputy City Attorney. Respondent would submit that petitioner had ample opportunity both to object to the ostensibly premature allowance of cross-examination and to later initiate re-direct testimony. He followed neither course of action.

E. WHATEVER ERROR THE TRIAL JUDGE MIGHT HAVE COMMITTED DID NOT PREJUDICE PETITIONER; SUCH ERROR IS, THEREFORE, "HARMLESS" UNDER THE FEDERAL "HARMLESS-ERROR" RULE

Respondent would submit that assuming, arguendo, that the trial judge did err procedurally in not inquiring of petitioner whether or not he wished to present further direct testimony, character witnesses, or argument, such possible errors have not been shown to be prejudicial to petitioner's case.

The California Constitution, Article VI, Section 4-1/2, provides in relevant part:

> "No judgment shall be set aside, or new trial granted, in any case, . . . for error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In reviewing a California case, this Honorable Court, rather than applying solely the harmless-error test prescribed by the California Constitution, preferred to use the method established by the Court in the case of Fahy v. Connecticut, 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229 (1963). The Court noted:

> "There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' Id., at 86-87, 11 L.Ed.2d at 173."

Chapman v. California, 368 U.S. 18, 23, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967).

As stated by this Honorable Court:

> "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

Chapman v. California, supra, at 22, 17 L.Ed.2d at 709.

Speaking of the harmless-error statutes or rules, which have been adopted by all fifty (50) states, this Honorable Court commented:

> "All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed

the result of the trial."

Chapman v. California, supra, at 22, 17 L.Ed.2d at 709.

Respondent would submit that the language of Chapman accurately applies to the present case. The Record on Appeal reveals that there is little, if any, likelihood that whatever errors the trial judge might have made changed the result of petitioner's trial.

F. CONCLUSION

Learned Hand, when on the Second Circuit, Court of Appeals, eloquently stated the need for an active judiciary:

"Justice can be as readily destroyed by the flaccidity of the judge as by his tyranny; impartial trials need a firm hand as much as a constant determination to give each one his due."

United States v. Dennis, 183 F.2d 201, 226 (C.A.2, 1950). (Cert. Granted, affirmed in Dennis v.

United States, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857 [1951].)

II

PETITIONER KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHTS TO COUNSEL AND JURY TRIAL

The arguments of petitioner regarding the ostensible impropriety of his waiver of counsel and jury trial are clearly devoid of merit. The Reporter's Transcript reveals the following colloquy between Judge Newman and the Deputy City Attorney, Mr. John Blair:

> "MR. BLAIR: Your Honor, has Mr. McArthur waived his right to counsel in this matter?
>
> "THE COURT: Several times: at the arraignment time, at the pre-trial time which I conducted. Defendant in pro per."
> (R.T. 3: 26-28; 4: 1).

Petitioner now asserts that even though he expressly waived counsel, he did so

without the requisite understanding or intelligence. Respondent submits that such a claim is wholly without foundation. It is apparent that throughout the proceedings petitioner displayed an uncommon intelligence and ability.

The constitutional requirements for waiver of the right to counsel are fully set forth by the case of People v. Witt, 15 Cal.App.3d 6; 92 Cal.Rptr. 770 (1971). Therein the court stated:

> "A defendant 'may waive counsel only if he has an intelligent conception of the consequences of his act . . . and understands the nature of the offense, the available pleas and defenses, and the possible punishments'; and a court may not accept his waiver unless it first determines his competency to act in the premises measured by the foregoing requirements. (People v. Robles, 2 Cal.3d 205, 218 [85 Cal.Rptr. 166, 466 P.2d 710]; [citations].)"
>
> People v. Witt, supra, at 11.

It is eminently reasonable to surmise that the trial judge was justified in believing that petitioner's waivers of counsel complied with the constitutional standards articulated by the cases cited in Witt.

The Witt case also held that a defendant has the burden of producing evidence that his constitutional right to counsel was infringed; that his waiver was, in fact, not made intelligently and understandingly. (People v. Witt, supra, at 13.) As noted above, no such showing has been made by petitioner.

As further stated by the California Court of Appeals in Witt:

> "'The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' (Johnson v. Zerbst, 304 U.S. 458 [82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 1023].)"
>
> People v. Witt, supra, at 13

Respondent submits that Judge Newman, having had the opportunity to scrutinize petitioner's intelligence and behavior on three separate occasions, was able to make an informed decision regarding petitioner's ability to represent himself. Absent a showing of abuse of discretion, the determination made by Judge Newman should not be disturbed. (People v. Robles, supra, at 218; People v. Carter, 66 Cal.2d 666, 672; 58 Cal.Rptr. 614, 427 P.2d 214 [1967].)

Respondent would note also that there is no statement in Respondent's Brief that, as claimed by petitioner, respondent deemed the crime with which petitioner was accused "not serious". The statement made by respondent was essentially that the crime of "shoplifting" is less serious than the crimes with which the defendant in People v. Robles, supra, initially cited by petitioner, had been charged. That defendant had been charged with first degree murder and assault with a deadly weapon.

Respondent's purpose in making the comparison noted above was to emphasize to the reviewing court the applicability to petitioner's case of the standard set forth

in People v. Carter, supra, and People v. Robles, supra, at 218: "The scope of inquiry into a defendant's ability to defend himself 'will, of course, vary accordingly to the seriousness of the crime charged,'. . . ."

As for petitioner's claim that his waiver of jury trial was improper, the record again speaks for itself. The following dialogue transpired between the court and petitioner:

"THE COURT: Trial by judge or by jury?

"THE DEFENDANT: By judge.

"THE COURT: Do you understand that you have a constitutional right to be tried by a jury?

"THE DEFENDANT: Yes.

"THE COURT: And you, knowingly, give up your right to be tried by a jury?

"THE DEFENDANT: Yes." (R.T. 3: 9-16.)

As stated by the United States District Court, Central District of California:

"Inasmuch as the privilege to have a jury may be waived, Simons v. United States, 119 F.2d 539 (1941), the burden is on petitioner to show that the jury waiver was not an intelligent and knowing waiver. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)."

Pace v. Nelson, 321 F. Supp. 622, 624 (1970)

Petitioner has clearly failed to meet that burden.

CONCLUSION

For the reasons set forth above, respondent respectfully submits that this Honorable Court should not grant the writ of certiorari for which Mr. McArthur has petitioned.

Respectfully submitted,

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